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Individual Enforcement of Community Law: The Future of the *Francovich* Remedy

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Introduction

The facts of the Francovich[1] case are by now well known. The Italian Government failed to transpose into national law the terms of Directive 80/987/EEC which required Member States to set up a compensation scheme whereby arrears of salary would be paid to employees by guarantee institutions in the event of their employer's insolvency. Further, it had failed to act upon a judgment delivered by the European Court of Justice under Article 169 EEC finding it in breach of its obligations in this respect.[2]

The applicants, left without compensation when their employers become insolvent, had been unable to bring an action in their national courts requiring the interpretation of national law in accordance with Community law,[3] there being quite simply no national legislation in the field of the directive which could be interpreted. Moreover, it emerged in the Court's judgment that they could not rely directly on the provisions of the directive because those provisions were insufficiently clear in respect of the institution which was to be responsible for paying compensation.[4] The applicants were therefore, under the current state of Community law, without remedy.

The Court held that the remedy of the applicants lay in a claim for compensation against the Italian government for failure to carry out its obligations under Community law. The Court stated that:

'.. Community law lays down a principle according to which a Member

State is obliged to make good the damage to individuals caused by a breach of Community law for which it is responsible.'[5]

This obligation arises out of Article 5 EEC which places a general duty on Member States to take all appropriate measures to ensure fulfilment of their obligations under Community law.[6]

Having made its general statement of principle, the Court laid down more specific criteria for liability in damages in respect of the individual case of non-implementation of a directive. Liability would arise where the directive conferred rights on individuals, where the content of those rights was identifiable from the provisions of the directive, and where there was a causal link between the failure of the Member State to fulfil its obligations and the damage suffered by the individual.[7]

Questions remain with respect to the operation of the remedy in the specific case of non-implementation of a directive. The criteria laid down by the Court were stated to be merely sufficient, and not necessary, to give rise to liability in damages,[8] whilst it is unclear, for example, whether a prior decision under 169 is required, and how proximate and discrete the 'causal link' must be. More general questions arise as to how other breaches of Community law by Member States are to be dealt with. The wording of the general principle of liability in damages suggests that compensation would be available for other types of breach, and the Court stated in fact that the availability of damages would depend on the nature of the breach of Community law,[9] but it made no attempt to detail the criteria for liability applicable to other types of breach. In particular, it is unclear whether there will be any role for a criterion of fault in the schema of this remedy, that is, whether a Member State will be able to avoid

liability in a particular instance by demonstrating that it had acted reasonably.

This paper shall attempt to achieve two objectives. First, to briefly place the Francovich case in its legal and institutional context and to demonstrate that whilst it may be a decision of enormous constitutional significance for the Community, it was by means unexpected and could even be described as inevitable. Second, to predict or suggest the ways in which the remedy may develop in the future, by examining whether a general basis for comparison can be found amongst pre-existing regimes for public authority liability in damages, and by assessing in greater detail the specific criteria which may determine the liability in damages of a Member State for breach of Community law.

The Damages Remedy in Context

The argument that a Member State should be financially liable for damage caused to individuals by its breach of Community law is by no means a new one. The Court itself submitted proposals to this effect as long ago as 1975.[10] The eventual creation, by the Court in Francovich, of a remedy in damages can be seen, however, as a natural consequence of certain institutional and judicial developments in the 1980s.

A. Institutional Developments

Of the institutional developments, the most significant was arguably the setting of the 1992 deadline for the completion of the internal market.[11] The

directive, which lays down a legislative framework to be transposed into national law by the Member States, was to be the main instrument of reform.[12] The task of ensuring that Member States effected a complete and faithful transposition of directives became, then, of paramount importance.[13]

It is the Commission which, under the Treaty, has the pre-eminent role in supervising compliance, by Member States, with Community law. Nevertheless, in pursuit of this end, the Commission is empowered with only the cumbersome, lengthy and, in many cases, including Francovich, ultimately ineffective 169 EEC action.[14]

The Court of Justice, however, has developed a system of judicial remedies in respect of the non-implementation of directives and thereby assisted the Commission in its enforcement responsibilities. A significant part of the Commission's burden of supervision has been passed onto individual enforcers, bypassing the shortcomings of the Article 169 procedure and freeing valuable resources for other tasks. The Francovich remedy is an essential component of this liability system.

The conferral of a new kind of right on individuals, the right to sue Member States in damages for breach of Community law, may also be seen as consistent with the institutional trend towards decentralisation, currently expressed in the principle of subsidiarity.[15] A subsidiarity-based approach to the allocation of legislative power, in moving power further away from the Commission, moves it further from the body which is supposed to supervise the exercise of that power in the Community sphere. When powers are devolved to national and regional governments, the Commission's only recourse is the Article 169 action. The development of the principle of direct effect of Community law has

allowed individuals to act in a supervisory capacity in certain circumstances,[16] and hence to compensate for the shortcomings of the 169 procedure.

In many cases, however, the directives and other legal instruments used in a Community guided by subsidiarity may well be too vague and allow too much discretion to the Member States to be susceptible to direct effect.[17] Other remedies must therefore be made available to individuals and on this view the damages action for breach of Community law can be seen as an essential element of the remedies system in a subsidiarity-based Community. As powers are moved closer to the citizens of the Community, so must the remedies for breach of those powers move also.[18]

It is important to note in this context that Francovich has a direct institutional parallel. New provisions in the Treaty on European Union amending Article 171 EEC allow the Court of Justice to impose lump sum and penalty payments on Member States who fail to comply with Court judgments finding them in breach of their Community obligations.[19]

B. Judicial Developments

The Treaty of Rome, whilst implicitly requiring that Community law be effective, seemed on its fact to have accepted a loose, public international law-like system of compliance. The only remedies provided for in the pursuit of compliance were the 169 action, and its sister provision, 170 EEC whereby one Member State would take action against another in the European Court of Justice.[20] The Court of Justice has, however, intervened to remedy this shortcoming. Various judicial efforts to encourage the effectiveness of

Community law can be identified, notably the development of the fundamental concepts of supremacy and direct effect of Commuity law.[21]

In Marshall,[22] however, in holding that the direct effect of directives could not be relied upon horizontally, by one individual as against another, the Court can be seen to have reached its limits of its activism. In terms of its reasoning, the estoppel-type argument which had been adopted to justify the conferral of direct effect on directives, that Member States could not be allowed to plead and so to benefit from, as against individuals, their own failure to perform the obligations entailed by a directive,[23] could not be cited against another individual who had no obligation to implement a directive. More general, conceptual difficulties arose out of the distinction drawn in 189 EEC between directives and regulations, a distinction which, had arguably been flouted even by the conferral on certain directives of 'vertical' direct effect, that is, as against the state. In political terms, certain national courts, notably those of France and Germany,[24] had objected to direct effect for directives under any circumstances and would clearly have had great difficulties in accepting the principle of horizontal direct effect.[25]

The basic problem posed by the decision in Marshall is that it creates arbitrary distinctions between individuals. On the facts of that case, the distinction fell between private and public sector employees, the latter but not the former being able to enforce their rights under Community law. The UK Government argued to this effect in Marshall eliciting the response that:

> 'Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive in national law.'[26]

Whilst the Court's response to this argument was clearly influenced by the fact that it was made by a Member State seeking to avoid liability for its wrongdoing, it is important to note that its response to the doctrinal problems caused by direct effect of directives was to encourage proper implementation from the start.[27] Direct effect, whilst promoting effectiveness in the individual case, does not in itself give much encouragement to proper implementation of directives, particularly where, as in Marshall the national remedies against the state are relatively insignificant.[28]

A natural consequence of the Court's approach in Marshall is therefore that individuals themselves must be given some meaningful remedy to compel implementation. A right to financial compensation where damage is incurred as a result of non-implementation is such a meaningful remedy. Francovich, then, in tackling at its source the problem of absent or faulty implementation does indeed bypass the doctrinal problems posed by Marshall.[29]

This argument would suggest, however, that the Francovich decision came twenty years too late. If, instead of conferring limited direct effect on directives in Van Duyn,[30] the Court had instead provided the applicant with a remedy in damages against the defaulting Member State, it might have achieved similar, if not better results in terms of implementation and general effectiveness of Community law, without the controversy and arbitrary drawing of distinctions which has arisen out of direct effect for directives.

The Elaboration of the Francovich Remedy

It is expressly stated in Francovich that it is for national systems to designate the courts having jurisdiction and to determine the procedural conditions (as to 'substance and form')[31] for the recovery of damages. This autonomy is however conditional. Firstly, it is contingent upon 'the absence of Community rules on this subject'.[32] As the Court of Justice lays down more detailed rules in future cases, so national rules will be modified or displaced. Secondly, it is subject to the usual conditions relating to national remedies in matters of Community law, that is, the remedies must be no less beneficial than remedies for breach of national law, and must not be excessively difficult to obtain.[33] Thirdly, the national courts' control over the details of the Francovich remedy will clearly, given the vagueness and generality of the decision, be exercised under the guidance of the Court of Justice through the Article 177 preliminary reference procedure. Whilst national courts may decide certain questions of Community law themselves, without seeking the assistance of the Court of Justice, the circumstances in which this is acceptable are strictly circumscribed,[34] and it is arguable that questions relating to Francovich cannot be considered 'easy' enough to be a suitable area for independent national court action.[35]

Most importantly, perhaps, the autonomy of national courts in the matter of national remedies has, in the recent past, frequently proved to be more apparent than real. The division of competence issue arose in the Zuckerfabrik case with respect to interim protection where the validity of national administrative measures based on Community legislation was in question.[36] The Court reasoned that whilst national courts have jurisdiction over national remedies, in practice this autonomy might prejudice the uniform application of Community law, given that national laws differed as to the conditions on which the operation of administrative acts could be suspended. Therefore the Court itself

had to lay down a framework of uniform rules. Moreover, even in respect of clearly procedural matters such as national time limits, the Court of Justice has felt the need to intervene, to curb the autonomy of national courts.[37]

In summary, the elaboration of the criteria for liability in damages for breach of Community law is likely to be a joint enterprise between national courts and the Court of Justice. The Court will lay down more general principles to be applied to particular cases by national courts which will at the same time develop procedural details, such as limitation periods.

Bases for Comparison

The Francovich action may be novel in the Community context but each and every legal system has its own rules on public authority liability, and it is instructive to determine whether Francovich liability has a useful analogue amongst pre-existing regimes.

The discourse of Francovich is concerned essentially with the situation where a lower level of government has not implemented, or has contravened, legal provisions issued by a higher level of government. The most obvious comparator would therefore be with federal legal systems, such as the United States and Germany, and specifically with actions whereby the citizen seeks to enforce state government compliance with federal legal provisions.

The immediate problem which arises with this project is the unique nature of the Community directive as a legislative instrument. It is not at all the case in

federal systems that the higher tier of government merely lays out a legal structure within which the units of government of the lower tier are free to choose the form and methods of regulation. Federal law is generally directly and immediately applicable in its entirety in state jurisdictions, and it is only the distinctive heterogeneous and diverse nature of the Community project which requires an interposing discretion between higher and lower tiers. Directives have features which are arguably closer to international treaties than to federal legislation.[38]

The comparison with public authority liability in damages in common law systems such as England is similarly problematic.[39]

Firstly, it is difficult to conceptualise the Francovich action in terms of duties of care on the part of public authorities towards particular individuals or classes of individuals, as is required under English law. Rather than arguing on the basis of the state's duty towards himself, the individual would appear to be enforcing the state's duty to the Community to implement directives, under 189 EEC, or more generally, to give effect to Community obligations, under 5 EEC.

More specifically, the Francovich remedy suggests the presence of a duty to the individual, and hence, in English law terms, of public authority liability in circumstances where such a duty would not normally arise under English law. In England, public authority liability, at least in negligence, is, in general, governed by a distinction known as the policy-operational dichotomy.[40] The lower the level of government at which the decision in question is taken, the more likely it is that a duty of care on the part of the authority will be implied. At the higher level of policy decisions, the duty of the public authority to the public as a whole supersedes its duty to individuals and a specific duty of care

will generally not arise. Francovich however is premised on a concept of liability to individuals for normative acts, or policy decisions, (such as the non-transposition of directives), which has no parallel in English law.[41] It has been noted that problems may arise if English courts attempt to assimilate Francovich principles into the existing English system of remedies rather than concentrating upon their communautaire source.[42]

A more useful comparison, favoured by Advocate General Mischo in Francovich, may arguably be made with the system of liability of Community institutions under Article 215 EEC.

Francovich and Article 215

The criteria for the award of damages against Community institutions under Article 215 EEC are notoriously narrow. A finding that the institution has acted illegally is not sufficient. The so-called Schöppenstedt formula states that:

> 'Where legislative action involving choices of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215 unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred.[43]

A sufficiently serious breach will only be constituted by a manifest and grave

disregard of duties by the institution concerned,[44] or alternatively by conduct verging on the arbitrary.[45] Recent cases have further indicated a type of standing requirement whereby applicants must have suffered serious loss and be part of a small and preferably closed group.[46]

The comparative development of the Francovich action along the lines of the narrow criteria relating to Article 215 infringements, favoured by Advocate General Mischo in Francovich itself, would be suggested by three factors. Firstly, it may be said in general that, like Francovich but unlike many existing national liability models, the Article 215 action presupposes the possibility of liability in damages of public authorities for normative acts. Secondly, the strictly circumscribed liability of Community institutions, has, according to the wording of 215 EEC, been arrived at having regard to the principles of public authority liability pertaining in the legal systems of Member States.[47]

Thirdly, certain national courts have been reluctant in the past to contemplate imposing liability on national authorities on the basis of criteria less favourable to the defendant than those which apply to the Community institutions under Article 215.[48]

This attitude has reflected a fear that Member States will not be allowed the same leeway with respect to discretionary policy choices, and particularly choices of economic policy, which Community institutions retain. In England, the question of liability in damages for breach of Community law has in the past been seen in the light of the complex doctrine surrounding the tort of breach of statutory duty, mainly because Community law is given force of law in the United Kingdom by the European Communities Act 1972. The problem in practical terms is that Francovich actions in damages for breach of Community

law could arise independently of the criteria for the tort of breach of statutory duty which are designed to limit the liability of public authorities.[49]

More specific concerns have focussed on the situation whereby a Member State may be liable for implementing a Community directive which subsequently turned out to be illegal, where the Community institution which issued it is not, because of the strict criteria which apply to Article 215 actions.[50] It may be stated immediately, however, that given the absolute obligation to transpose directives into national law incumbent on Member States under Article 189 EEC, there are strong arguments to suggest that in such a situation, only the Community and not the Member State would be liable.[51] This point is further discussed below.

However, there are good reasons for suggesting that Article 215 is not in fact a comparator suitable for use by either the Court of Justice, or by national courts, in the development of the Francovich action.

The ECJ has itself warned against applying Article 215 rules to national litigation. In the BALM case, the Court of Justice rejected the argument that the rules relating to limitation periods under Article 215, should be adopted for the purposes of a national law remedy. It stated that national authorities must instead:

> '..assess [the] ... situation on the basis of the rules and principles of their own national laws provided that they do not make a distinction between situations governed by Community law and similar situations subject to the application of national law alone.'[52]

An English court which applied the criteria applicable to 215 actions to a Francovich claim would arguably be in contravention of its duty under 5 EEC to ensure that remedies for breach of Community law are as favourable as equivalent national law remedies. In so doing it may also breach the second limb of its duty, to ensure that the remedy is not excessively difficult to obtain in practice.[53]

Further, the Court's attitude towards the development of the 215 action against Community institutions can be said to be based on policy considerations which differ in significant ways from those which gave rise to the Community remedy in damages for breach of Community law.[54]

It has been suggested above that the Francovich decision is founded on a desire to promote the effectiveness of Community law, and in particular, to encourage Member States to properly implement Community directives. These policies would suggest a more liberal approach to the award of damages. The application of restrictive Article 215 criteria would render the threat of damages, if not illusory, at least remote, and would not be in complete accordance with the principle of effectiveness.

The Court of Justice has indicated in relation to 215 actions, that it is keen to guard against indeterminate liability, to avoid placing the Community in the position of being a 'deep-pocket insurer' for the everyday risks of its subjects. This basic concern with respect to public authority liability is shared by national courts throughout the Community, indeed throughout the world.[55] However, it is arguable that certain features are specific to the Community as a whole and to the 215 action in particular, features which render the conditions of Article 215 unsuitable for wider application.

Firstly, the Community is, in some respects, potentially a different type of deep-pocket insurer. The Community covers an area of twelve states and intervenes directly in the market through a variety of broad, open-textured provisions which aim to promote general economic goals if necessary at the expense of individual economic interests. Together with the Treaty of Rome's acceptance of liability for normative acts, this would suggest that the Community may often be the object of large damages claims. Further, the Community has very limited financial resources, at least compared to its Member States, due mainly to the absence of power to levy direct taxes. The perils of being a deep-pocket insurer may be all the greater for the Community, and the need to restrict liability under Article 215 becomes all the more urgent.

As a correlative point, Article 215 actions tend, almost without exception, to deal with a particular type of case, where the Community institution has made a choice of economic policy. The Court frequently stresses the specific nature of these decisions and the need to give the institutions as free a hand as possible in making them.[56] A general action against a Member State for breach of Community law will clearly encompass a wider range of decisions, requiring lesser degrees of flexibility on the part of the decision-making authorities, and accordingly, a more interventionist judicial approach.

Secondly, the restrictive Article 215 criteria are partially dictated by the complex and delicate nature of the Community legislative process. The frequent difficulty in achieving the requisite consensus to pass Community legislation, combined with the fact that Community acts can be declared invalid in 215 proceedings has two basic consequences. The reality of the threat of liability in damages may seriously inhibit the discretion of the Community legislator, a discretion which is already encumbered with the demands of twelve differing

national interests, and the pressures of the Euro-lobby. Further, it may be extremely damaging to the general Community interest for the Court to overturn legislation which proved so difficult to arrive at in the first place. These concerns are also reflected in the Court's strict interpretation of the requirements for standing to bring a direct challenge to a Community act under Article 173.[57]

Thirdly, the policy behind the development of the Article 215 criteria is intimately tied up with the Court's perception of the functioning of the Community remedies system as a whole. It seems that the criteria of Article 215 have developed in part to ensure that applicants do not utilise the 215 action as merely an alternative means of having the legal effects of a particular act removed, thereby avoiding the rigourous standing criteria of the Article 173 EEC action for annulment and the delays and other uncertainties inherent in the Article 177 EEC preliminary reference procedure. The standing criterion based on the seriousness of the loss suffered by the applicant, which has been evident in recent cases,[58] clearly bears out this policy. It has the effect of establishing that the applicant genuinely requires a remedy in damages and is not 'abusing' the Treaty's schema of remedies.

This argument is supported by the views of Advocate General Tesauro in the Export Credit Insurance case. He felt that the criteria applicable to Article 215 were designed to exclude those applicants who could have used the preliminary reference procedure with similar facility and effect.[59]

These considerations will not affect the development of Francovich in the same way.

Nevertheless, the idea of applying Article 215 criteria to the Francovich action appealed to Advocate General Mischo. He argued that the Community could not reasonably oblige national courts to award damages against their public authorities on the basis of criteria broader than those applicable to Article 215.[60] Nevertheless, the 215 criteria were to be regarded as a minimum; national judges could hold the State liable on less restrictive conditions if national law permitted.[61]

The Advocate General seems concerned to ensure that the criteria which national courts will apply are no more favourable to the individual claimant than the criteria applicable to Community actions before the Court of Justice. This is very different from the Court's view with respect to national remedies for breach of Community law, which, as noted above, requires that they be no less favourable to the claimant than remedies applicable to purely national law actions. The Court has been silent with respect to the question of whether national remedies ought to be more or less favourable than purely Community remedies, except to state in BALM that the comparison ought not to be made.[62]

The reasoning of the Advocate General's must also be subjected to closer examination. He analogised with the issue of the availability of interim measures in actions against measures alleged to be in breach of Community law. In recent years, the Court has handed down two landmark decisions in this field, Factortame I,[63] dealing with national measures which may be contrary to Community law, and, subsequently, Zuckerfabrik,[64] which concerned the power of national courts to suspend the operation of national provisions based on Community measures, owing to doubts about the validity of the Community measure. In the latter case, the Court, referring to its decision in Factortame I, felt that, for the sake of uniformity and the need for 'a coherent system of

provisional protection', national courts ought to apply the same rules with respect to interim relief which the Court itself applied in suspending the application of a Community provision under 185 EEC. This approach, of applying Community rules to national actions, the Advocate General felt, ought to be carried into the field of liability in damages.

It is no doubt reasonable to compare the situation in which the Court suspends a Community measure, and that in which a national court suspends a national provision based on a Community measure. The primary policy considerations underlying both instances of provisional protection, the need to protect individuals from serious and irreparable damage whilst at the same time maintaining, where possible, a presumption of legal validity and legal certainty, are the same.

In contrast, and in accordance with the above discussion, the policy considerations which have shaped the development of Article 215, particularly those which focus on the specific characteristics of the Community and the remedial system of the Treaty of Rome, cannot confidently be said to apply equally to the Francovich action. Francovich itself, furthermore, is founded upon a policy of promoting the effectiveness of Community law in general, and the implementation of directives in particular, which is not relevant to Article 215 principles. The two remedies are qualitatively different and it would be unreasonable to treat them in the same way.

The application of Article 215 criteria was also said by the Advocate General to follow from the Asteris case,[65] in which the Court held that its previous judgment dismissing a 215 action against the Community in respect of a measure laying down coefficients for the granting of aid,

'precludes a national authority which merely implemented the Community legislative measure and was not responsible for its unlawfulness from being held liable on the same grounds.'[66]

Again, it is difficult to see how this argument can justify the transposition of Article 215 principles into the realm of national authority action. The key point in this type of case, as the Court suggests, is not whether national authority ought to be judged upon Article 215 criteria, or something broader, but rather that national authorities ought not to be judged at all because they are not responsible for the breach of Community law. Member States are subject to a strict duty, under Articles 5 and 189 EEC, to give effect to Community measures and it is the Community institution and it alone which can be held responsible for damage resulting from the promulgation of an illegal Community measure.[67]

In summary, whilst they have obvious attractions, particularly to defaulting Member States, the principles which govern the liability of Community institutions under Article 215 are not susceptible to transposition into the realm of the Francovich action.

Individual Enforcement: Francovich from the top down

In summary, it seems that the Francovich action has no direct analogue when it is viewed from the bottom up, that is, from the point of view of the individual, as an action which enables the individual to claim damages against the state.

It is the main contention of this paper, however, that the Francovich action ought not to be conceptualised in this way. The remedy is better looked at from the top down, that is, from the point of view of the system of government which is Community law. This new Community law remedy, whilst conferring a potent weapon for enforcing their rights upon individuals, is primarily a means of enforcing, and enhancing the effectiveness of, Community law.[68] The threat of liability in damages to individuals has great symbolic importance and will undoubtedly encourage a greater rigour in compliance amongst the Member States. The enhanced level of individual protection which the remedy may engender is arguably secondary to this goal.

When the damages remedy is conceived of in this way, it is apparent that the obvious basis for comparison in its future development is the Commission 169 EEC enforcement action.[69] This comparison is all the more pertinent given the new powers to be conferred upon the Court by the Treaty on European Union which will allow it to impose monetary penalties on non-compliant Member States.

The analogy is strengthened by certain cases brought under Article 169 which were cited by the Advocate General in Francovich in support of the general proposition that Member States can be liable to individuals. The Court has stated that an action under 169 protects an interest which:

> 'may, in particular, constitute the basis of liability to which a Member State may be subject by reason of its failure to fulfil an obligation, whether that liability is to other Member States, to the Community or to individuals.'[70]

This reasoning is significant. In predicting how the criteria for liability under Francovich could and should develop it is indeed necessary to draw upon the rich body of Court of Justice caselaw in relation to the 169 action. It is difficult to see any reason why the Court should attribute liability in principle to Member States for breach of Community law on the basis of criteria which differ according to whether the plaintiff happens to be the Commission or an individual. Given that the rationale behind the establishment of the remedy was, at least in part, to further alleviate the Commission's enforcement burden it would be strange if the Member State were to be treated more favourably when sued by an individual 'attorney general' than when brought to court by the Commission.

The specific principles which may be drawn out of the Article 169 caselaw will be set out in greater detail below. Nevertheless, it is important to note at this stage that the major characteristic of liability under Article 169 is that it is, for all intents and purposes, strict. It is very rare for a Member State in 169 proceedings to succeed in justifying a failure to comply with Community law. Various imaginative arguments have been put to the Court to excuse a prima facie breach of Community law; the vast majority have been rejected.[71] The Court has tended to construe the duty to abide by Community law as a strict one, on the specific basis of 189 EEC in the area of implementing directives, and, inter alia, on the more general duty of cooperation of Article 5 EEC in other areas.

The primary reason for the Court's strong line in 169 actions seems clearly to be the important Community interest in ensuring that Community law is observed. It is important to note, however, that the Court's attitude has been facilitated, in political terms, at least, by the weak nature of the remedy under

169, a mere declaration that the Member State has breached the law. The task of deciding whether to attribute liability is obviously made easier by the knowledge that the consequences for a state held to be in default are not serious.

The Conditions of Liability

The Article 169 comparison, whilst providing a general framework for analysis, may also assist in the elucidation of the specific conditions which should be applicable to the Francovich action.

A. Prior judgment under 169

There are several arguments against the proposition that a decision under Article 169, or at least a prior ruling of some sort by the Court of Justice, is a pre-requisite for Francovich liability. The Court itself was silent as to whether this was a decisive element of the Francovich circumstances. It is undisputed, however, that decisions under Article 169 actions are merely declaratory and not in themselves constitutive of breaches of Community law.[72] Article 169 actions, like preliminary references, are merely means to the end of establishing that a national decision contravenes Community law. This may be established equally by a national judge sitting in a domestic court, without the help of the European Court. Further, the Court of Justice has emphasised the principle of procedural economy in relation to actions under Article 215.[73] It is difficult to see why this consideration should not apply equally to Francovich actions. Finally, it may cause injustice for plaintiffs to have to wait for a 169 judgment

and may encourage delaying tactics by the Member States in question.

The use of the Article 169 analogy, however, is conclusive. When the Francovich remedy is looked upon as merely an alternative, individualised form of enforcement action, designed to relieve the burden on and compensate for the shortcomings of, Commission resources, it seems at best unnecessary and at worst incoherent, to require that the Member State be sued by both the official and the unofficial enforcement authorities.

B. The Requirement of Fault

The absence of a fault criterion from the Court's reasoning in Francovich, is significant, inter alia because it conflicts with practice in a majority of Member States which do require fault by a public authority in order to sustain a damages action.[74] The Court's failure to mention fault may be explained on the basis that the criteria were written having regard to the particular context, the non-implementation of a directive, and that following a ruling under Article 169 on the issue. In this instance, fault may be considered to be implicit in the failure to implement. However, a more general explanation according to established 169 caselaw is more appropriate. As has been noted above, in Article 169 proceedings, the Court is very reluctant to accept arguments from Member States excusing their failure to observe Community law. Such arguments, which frequently focus on the issue of fault, have included claims that a lower level of government with a degree of autonomous power was responsible for the breach,[75] that another, constitutionally independent branch of government was responsible,[76] and that one of the Community institutions was responsible, directly or indirectly.[77]

The closest which the Court of Justice has come to making provision for fault has been the recognition of the principle of force majeure. In the Statistical Returns case,[78] wherein Italy's obligatory statistical returns to the Community were destroyed in a bomb attack, the Court conceded that the Member State which has encountered insurmountable difficulties outside its control could not be held responsible for the consequent breach of Community law.

It is difficult, however, to see any justification for the Court of Justice being prepared to accept broader fault-based excuses from a Member State in the context of a Francovich damages claim which it would not have accepted in 169 proceedings, particularly where the result in the former instance may well be a denial of substantive justice to an individual.

There are also certain conceptual problems relating to the judicial structure of the Community system which arise in the context of a requirement of fault. The Court of Justice encourages national courts to make Article 177 references unless the answer is clear to them and they are certain that other national courts would come to the same conclusion.[79] In cases of doubt, and in more clear cut but politically sensitive cases, the tendency of the national courts would be to refer as much as possible to the Court of Justice. It is difficult then to argue that national authorities were at fault, in acting knowingly or even negligently in breach of Community law, if a reference to the Court of Justice was required to determine that the breach had in fact occurred.

C. The Definition of the State

The Francovich remedy consists in an action against the state for damages

arising out of a breach of Community Law for which it was responsible. The issue of responsibility raises the question as to which agencies are to be considered to be part of the state apparatus.[80]

This task of drawing the line between the public and the private spheres arises in several other areas of Community law. Marshall, for example, requires the distinction to be drawn in order to distinguish vertical from horizontal direct effect, since an individual can only claim a directly effective right against an organ of the state.[81] A similar project is required, inter alia, to determine the scope of the public authority exception to the free movement of workers under Article 48 EEC.[82]

In each example, the way in which the public-private distinction is to be drawn depends on underlying policy considerations.[83] In the Marshall scenario, the Court is determined to construe the state as broadly as possible so as to give as many individuals as possible access to the remedial potential of direct effect.[84] On the other hand, the Court's policy in relation to the public authority exception has been to draw a narrow picture of the state in order to open up as many jobs as possible to the principles governing the free movement of workers.

In relation to Francovich, it is arguable that the Court will strive for a broad definition of the State so as to bring as many breaches of Community law as possible within the ambit of the remedy. Nevertheless, the paradigm ought not to be the Foster definition but rather the Court's practice in relation to Article 169. An important case in this respect is the 'Buy Irish' case.[85] The attribution of liability to the Irish Government for the activities of 'The Irish Goods Council' in this case suggests that state responsibility may arise through the actions of a private body whose activs are subject to direct or indirect

governmental control.[86]

D. Other Conditions

Other details may be predicted on the basis of 169 practice; for example, the fact that interim protection is available in 169 proceedings would suggest that it should also be available in the Francovich action.[87]

Certain criteria, however, cannot be gleaned from the Article 169 caselaw because of the nature of that remedy. For example, the conditions applicable in the instance of non-implementation of a directive, include the existence of a causal link of unspecified proximity between the failure to implement and the damage to the individual. Article 169 has not thus far proceeded beyond the identification of the breach of Community law and so can be of little help in elaborating this concept.

The natural place to look for assistance would be the principles applicable to Article 215, which, after all, are derived from those of the Member States. In Dumortier, the Court determined that the damage to the individual had to be 'a sufficiently direct result' of the actions of the defendant institution in order to found liability under Article 215.[88] However, in accordance with the Court's general policies in relation to Article 215, virtually any interposing causal factor has been enough to render the link insufficiently direct, although in exceptional cases the Court has been willing to countenance the apportioning of blame.[89] A different, more lenient, approach may be anticipated in relation to the Francovich remedy, for the reasons discussed above.

Limiting Damages: Article 169 and the Floodgates of Liability

Whilst the argument that Francovich ought to develop by analogy with Article 169 actions has a certain theoretical basis, it must be recognised that the damages remedy is significantly different from the 169 declaration, threatening altogether more serious consequences for the defaulting Member State. The argument that an assessment of liability under Francovich should proceed on the same basis as under Article 169 must address the threat of indeterminate public authority liability. If every prima facie breach of Community law by a Member State which occasioned harm to an individual were to lead directly to a finding of liability in damages, the amount of damages paid out would be astronomical, with serious consequences for the ability of governments to intervene in the running of society.

It must be said, at the outset, that the threat of overwhelming damages claims against Member States seemed to be secondary in the mind of the Court in Francovich to its concern to promote the effectiveness of Community law. This may be inferred firstly from the fact that, contrary to the advice of its Advocate General, the Court declined to limit the temporal effect of its judgment. The damages remedy is therefore applicable to factual situations arising before November 1991. Secondly, the criteria which the Court laid down in respect of the immediate issue, the failure of a State to transpose a directive, are broad,[90] utilising, on their face, none of the mechanisms traditionally used in national systems to limit public liability.[91]

Further, it is argued that the analogy with Article 169 is not defeated by the threat of indeterminate liability. Drawing upon the practice of the Court of

Justice in other fields, there are a number of ways in which the potential liability in damages of Member States can be maintained within limits which suggest to them a real incentive to give effect to Community law without, however, presaging their financial ruin.

A. Restricting the Use of the Remedy

The first and arguably the bluntest way in which liability in damages may be restricted is by reducing, ab initio, the class of potential plaintiffs who are entitled to claim damages under Francovich. There are two ways of doing this. Firstly, the remedy may be treated as one of last resort only. The Court of Justice has already gone some way towards ordering the various remedies available to individuals into a hierarchy of preference. Direct effect is only to be cited where Community law cannot be given effect by means of the interpretation of national law in accordance with it, as required by von Colson and Marleasing.[92] This seems only logical. Direct effect, and damages claims, for that matter, involve the citation of provisions of Community law in opposition to national law. The issue of whether national law can be read as being compatible with Community law is clearly a preliminary one.

In the absence of the possibility of giving a Marleasing interpretation to national law, the methodology of the Francovich judgment is to examine firstly whether the instrument in question is susceptible to direct effect, and only if it is not to contemplate providing the individual with a remedy in damages. It is not unreasonable to suggest that the Francovich remedy is intended to be a safety-net, only to be used where the primary recourses, the interpretation of national law in accordance with Community law, and reliance on a directly effective

right are not available. Such an approach would considerably reduce the number of damages claims.

Secondly, the Court may restrict the use of the remedy, and therefore the seriousness of its consequences temporally, on a case by case basis. Such an approach would be consistent with its strategy in other areas, notably in relation to Article 119, whereby the Court has upheld broad principles of equality, but mitigated the wide-ranging consequences of its judgments by denying them, with varying degrees of success, a retroactive effect.[93] This practice seems partly to be based upon the view that the plaintiff, having invested time and money in bringing the case, which has itself served a valuable purpose in the context of the Community legal order, deserves to reap the benefits in the individual case. Other potential plaintiffs, except those who have already commenced actions, and themselves made a certain investment in the Community interest, are excluded, as volunteers. Also, once the point of Community law has been clarified in a single case, the benefit for the Community legal order of future cases on the same issue is reduced.

The fact that there is no time limit put on Francovich itself, does not imply that none should be put on future damages claims. The facts of Francovich may be seen as special in this respect. Individuals were claiming damages in lieu of arrears of salary which ought to have been provided to them by a body designated by the Italian Government. The link between the right to arrears conferred by Community law and the action for damages was thus a direct one, and the default by Italy rather blatant.[94] It would arguably have been unreasonable to exclude other individuals in the same position as the applicants from bringing actions in the future. These individuals were, and are, clearly entitled to the money and an action in damages is, in practice, simply an

alternative means of obtaining it.

Thirdly, at least in the case of non-transposition of directives, the range of potential plaintiffs may be restricted by means of a strict construction of the requirement that a directive must confer rights for the benefit of individuals. The use of the remedy may be limited to the specific class of people to whom the directive, or the particular provision(s) of the directive in question, is intended to benefit. English courts have adopted this approach with respect to the tort of breach of statutory duty. For liability to ensue, the plaintiff must, as a preliminary point, belong to a class which the duty in question is specifically intended to benefit. In this way, claims relating to general duties, and those made by individuals outwith the beneficiary class, will fail.[95] On this view, regardless of the national rules on locus standi, a claim in damages against the Italian Government for failure to transpose Directive 80/987 would not be available to, for example, dependents and creditors of sacked workers, trade unions and other interested parties who may be able to show damage.

B. Reasonable Breaches of Community Law

The fact that a successful 169 action results in a mere declaration against the Member State, that it was in breach of Community law, dictates that liability can be attributed without undue rigour in situations where there were varying degrees of pre-existing uncertainty about the state of the law. The Court in this way acts in an advisory capacity, giving a definitive interpretation of the law in cases of doubt. Where the result of an action may be the award of possibly substantial damages, however, 'marginal' or 'reasonable' breaches of the law become more problematic.

It seems tempting, in this regard, to borrow criteria of liability from Article 215 jurisprudence, which, as noted above, would award damages only in the case of serious breaches of Community law. 'Marginal' or 'reasonable' breaches thus escape financial sanction. This temptation should, however, be resisted.

In the immediate case of implementation of directives, the question of whether a directive has been correctly implemented seems clearly to be an objective one. It cannot be dependent on the subjective attitude or intention of the Member State in question.[96] This is reflected in the Court's decisions under Article 169. National measures which reasonably but incorrectly implement a Community directive, are, nevertheless, in breach of Community law, and if the directive gives clearly identifiable rights to private parties, and incorrect implementation gives rise to damage to an individual, then, under Francovich, damages may be awarded.

If, as suggested above, Francovich liability is to extend beyond the specific facts of the case, to other types of breach of Community law, it is hard to see any justification for considering the seriousness of the breach in these other areas, where it is not relevant to the implementation of directives.

It may seem harsh to contemplate awarding potentially large amounts of damages where the Member State has acted reasonably. Nevertheless, it should be noted initially that breaches of Community law, in particular in the case of failure to properly transpose directives, do not arise suddenly or without portent. The legislative process in any Member State covers a substantial period of time and offers ample opportunity for the State to consult with, inter alia, the Commission, in cases of doubt, so reducing the likelihood of unforeseen breaches of Community law.

Further, the obligation of national judges to interpret national law in accordance with Community law may render the marginal breach of Community law, particularly in the context of the implementation of directives, if not obsolete then at least rare.

The argument has been made over the years that the 169 remedy is is too weak and can have little real effect in encouraging compliance with Community law. Now that a stronger remedy against failure by Member States to apply Community law has been created, it is difficult to sustain the argument that the Court ought to soften its approach towards attributing liability for breach of Community law. The end result of the approach outlined above is that Member States will have to be extremely vigilant in ensuring that they have complied with Community law. Such vigilance can only strengthen the Community legal order.

Conclusion

The Francovich judgment has laid down a principle of potentially major constitutional significance for the Community. The way in which that principle is elaborated in the future will determine the extent of this significance. The Article 169 enforcement action is the remedy which approximates closest to Francovich, and the one which ought to act as the paradigm for the latter's development. In this way, Francovich should be conceived primarily as an individual enforcement action, rather than as a means by which an individual may claim damages against public authorities.

Having taken the necessary and arguably inevitable step of recognising a remedy in damages, it is to be hoped that the Court of Justice will not apply to Francovich restrictive conditions of liability such as those which it has laid down in the context of Article 215. The Francovich remedy could do much for the strength and efficacy of Community law; it must be allowed to fulfil its potential.

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1. Joined Cases C-6&9/90 Francovich, Bonifaci and others v Italian Republic [1991] ECR I-5357; [1992] IRLR 84. Noted E.Szczsyzak (1992) 54 MLR 690; P.Duffy (1992) 17 ELR 133; D.Curtin (1992) 21 ILJ 74; G.Bebr (1992) 29 CMLRev 557. See also M.Ross, 'Beyond Francovich' (1993) 56 MLR 55; J.Temple Lang, 'New Legal Effects Resulting From the Failure of States to Fulfil Obligations under European Community Law: the Francovich Judgment', (1992-93) 16 Fordham Int'l LJ 1.

2. Case 22/87 Commission v Italy [1989] ECR 143.

3. See Case 14/83 von Colson and Kamann v Nordrhein Westfalen [1984] ECR 1909; Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1991] ECR I-4135, noted P.Mead (1991) 16 ELR 490.

4. Paragraphs 25-27 of the Francovich judgment.

5. Paragraph 36 of the judgment.

6. Article 5 EEC has been used increasingly by the Court in recent years to justify the imposition, or elaboration, of new or more onerous duties upon the Member States and their courts. See, for example, von Colson, supra n 3, and generally, J.Temple Lang, 'Article 5 of the European Community Treaty: the Emergence of Constitutional Principles in the Case Law of the Court of Justice' (1987) 11 Fordham Int'l LJ 503; J.Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty' (1990) 27 CMLRev 645. The Court has, however, warned the Commission about using Article 5 as a means of imposing new obligations upon Member States: Case 229/86 Brother Industries v Commission [1987] ECR 3757.

7. Paragraph 40.

8. Paragraph 41.

9. Paragraph 38.

10. EC Bulletin, supplement no.9/75, p18.

11. Single European Act, now EEC Treaty Article 8A.

12. This policy was in accordance with the Commission's more general move away from the pursuit of harmonisation of laws and towards the mutual recognition of national laws. See Completing the Internal Market, White Paper from the Commission to the European Council, COM (85) 310 final of 14 June 1985.

13. For a general discussion see F.Snyder, 'The Effectiveness of Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 MLR 19, 41-47.

14. Article 169 EEC requires that the Commission deliver a reasoned opinion to a Member State which it believes has failed to fulfil a Treaty obligation, having given the State concerned the opportunity to submit its objections. Article 169(2) states that: 'If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.' With regard to shortcomings of this remedy, the Court itself has stated:

> '[L]egal certainty entails the filling of a legal gap in the Treaty of Rome in that it does not expressly provide for any effective sanction against a State which fails to temper its obligations, to the detriment of those which do.'

See Court suggestions, supra n 10, at p17. Also, D.Curtin, 'The Decentralised Enforcement of Community Law Rights. Judicial Snakes and Ladders' in D.Curtin and D.O'Keeffe (eds), Constitutional Adjudication in European Community and National Law (Dublin: Butterworths 1992) at p33, extending the criticism to centralised enforcement in general.

15. Article 3B, paragraph 2, of the Maastricht Treaty on European Union states that:

> 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

Whilst achieving full recognition only in the Treaty on European Union, the principle of subsidiarity will not stand or fall with that treaty. It is said to have been operational in the Community for quite some time before, being embryonic

in certain provisions of the ECSC and EEC Treaties, and elaborated with respect to environmental policy in Article 130 R, paragraph 4, of the Single European Act. See Conclusions of the Presidency, European Council in Edinburgh, 11-12 December, 1992, Annex 1 to Part A, page 2.

See generally M.Wilke and H.Wallace, Subsidiarity: Approaches to Power Sharing in the European Community, Royal Institute of International Affairs Discussion Paper No.27 (1990); N.Emiliou, 'Subsidiarity: An Effective Barrier Against the "Enterprises of Ambition"?' (1992) 17 ELR 383.

16. For a general account, see T.Hartley, The Foundations of European Community Law (Oxford: Clarendon Press, 2nd ed, 1988), chapter 7.

17. The issue of whether or not a particular measure, generally a directive, is directly effective and therefore able to confer rights upon individuals has generally focused on the completeness of the legal obligation expressed therein. Measures which are clear, precise and unconditional will be unproblematic in this respect but the greater the discretion left to the Member States the more difficult it will be to infer direct effect. See, for example, Case 8/81 Becker v Finanzamt Münster-Innenstadt [1982] ECR 53. Francovich itself, at paragraphs 9-27, is a good example of the operation of this principle. The Commission has noted that:

> 'If the subsidiarity exercise is to produce any overall tangible results then it must unquestionably be by systematically reverting to the original concept of the directive as a framework of general rules, or even simply of objectives, for the attainment of which the Member States have sole responsibility.'

See The Principle of Subsidiarity, Communication from the Commission to the Council and the European Parliament, SEC(92) 1990 final, 27 October 1992 at p15. An Intergovernmental Conference to be convened in 1996 will consider whether indeed the directive is capable of adequately reflecting considerations of subsidiarity or whether a new Community instrument, the framework law, is required.

18. The Court of Justice has already had to deal with challenges to the effective enforcement of Community law raised by the exercise of power at progressively lower levels. In Case 103/88 Fratelli Costanzo SpA v Comune di Milano [1989] ECR 1839, for example, the Court stressed that all levels of the national administration are bound by the duty of Community loyalty of Article 5 EEC. See also Case 8/88 Germany v Commission: Re Suckler Cows

[1992] 1 CMLR 409 and Case C-33/90 Commission v Italy: Toxic Waste in Campania [1992] 2 CMLR 353.

19. Proposals for both the Francovich and the 171 EEC reforms were put forward by the Commission in its submissions to the Intergovernmental Conference preliminary to the Maastricht European Council meeting. See Intergovernmental Conferences: Contributions by the Commission, EC Bulletin Supplement 2/91.

20. This provision has rarely been used: 'In practice the member States have shown little enthusiasm for their independent right of action under Article 170.' See A.Dashwood and R.White, 'Enforcement Actions under Articles 169 and 170 EEC' (1989) 14 ELRev 388, 409.

21. See J.Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403, 2413 et seq.

22. Case 152/84 Marshall v Southampton AHA [1986] ECR 723.

23. See Case 148/78 Pubblico Ministero v Ratti [1979] ECR 1629.

24. In France, see Minister of the Interior v Cohn-Bendit (Conseil d'Etat) [1980] 1 CMLR 543; in Germany, see Re VAT Directives (Bundesfinanzhof) [1982] 1 CMLR 527, [1989] 1 CMLR 873.

25. It has frequently been suggested that, in the name of effectiveness, the Court ought to overturn its decision in Marshall and agree in principle that directives can have horizontal direct effect. It seems, however, that the principle of subsidiarity may put an end to this debate. The directive, as an instrument laying out only a regulatory framework, can be seen as an expression of subsidiarity at a legal level, as compared with the regulation which is directly applicable and leaves no discretion to Member States. The Commission has described the directive as 'an original instrument which typifies subsidiarity.' See The Principle of Subsidiarity, Communication from the Commission to the Council and the European Parliament, supra n 17 at p15; R.Dehousse, '1992 and Beyond: The Institutional Dimension of the Single Market Programme' (1989) Legal Issues of European Integration 109, 132. One of the arguments which has always been used against horizontal direct effect for directives is that it would assimilate directives to regulations. Such a project would always have been questionable with regard to the clear distinction posited between the two in Article 189 EEC but now also would conflict with the important constitutional principle which is subsidiarity.

26. At paragraph 51. Advocate General Mischo in Francovich uses similar words in considering the potential financial consequences for Italy of his decision. He states, at paragraph 84, that:

> '..it will be easy in future for Member States to avoid a similar situation; all they have to do is implement the Directive within the periods prescribed.'

27. Consistent with this view, the Advocate General in Francovich considered that the availability of damages would enable the national judge to place less emphasis on the importance of direct effect. (See paragraph 92 of his opinion).

28. In Marshall (No.2), currently under consideration by the Court, Mrs Marshall is claiming damages for being wrongfully forced into retirement at age 60. Compensation had been paid by the Area Health Authority but was limited by the Sex Discrimination Act 1975 which imposed a damages ceiling of £6250. The case will determine, inter alia whether such a remedy can be characterised as effective, and if not, whether the damages ceiling must be overruled or ignored.

29. The recent case of Emmott v Minister of Social Welfare, Case C-208/90, [1991] 3 CMLR 894, noted E.Szczsyzak (1992) 29 CMLRev 604, is arguably founded upon a similar philosophy. In holding that national limitation periods on actions relating to Community directives cannot start to run until the directive has been properly implemented, the Court removed any incentive which a Member State may have had in this respect for delaying implementation.

30. Case 41/74 Van Duyn v Home Office [1974] ECR 1337.

31. Paragraph 43 of the judgment.

32. Ibid., paragraph 42.

33. See Case 33/76 Rewe v Landwirtschaftskammer für Saarland [1976] ECR 1989; Case 45/76 Comet v Produktschaap voor Siergewasen [1976] ECR 2043; Case 199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR 3595.

34. See Case 283/81 CILFIT Srl v Ministero della Sanità [1982] ECR 3415; noted H.Rasmussen (1984) 21 CMLRev 242.

35. The English Divisional Court recently referred to the Court of Justice a detailed list of questions relating to a damages claim by a consortium of Spanish fishermen who successfully challenged the British Merchant Shipping Act 1988

(See Case C-221/89 Factortame II [1991] 3 CMLR 589). On the other hand the French Conseil d'Etat has recently awarded Francovich damages against the French Government without seeking a reference, and Lord Goff, speaking for the House of Lords in Kirklees BC v Wickes, [1992] 2 CMLR 765, had no difficulty in assuming that the UK Government would be liable in damages under Francovich if the Sunday Trading provisions of the Shops Act 1950 were found by the Court of Justice to be in breach of Community law.

36. Joined Cases C-143/88 and C-92/89 Zuckerfabrik Suderdithmarschen and Zuckerfabrik Soest v Haumptzollampt Itzehoe [1991] ECR I-415.

37. Case C-208/90 Emmott, supra n 29.

38. See Temple Lang, supra n 1, at p49.

39. For a general account, see H.Wade, Administrative Law (Oxford: Clarendon Press, 6th ed, 1988), chapter 20.

40. See further on this distinction Rowling v Takaro Properties Ltd [1988] 2 WLR 418. A useful discussion, which influenced the Privy Council in Rowling, is to be found in P.Craig, Administrative Law (London: Sweet and Maxwell, 2nd ed, 1989) ***.

41. Other Member States, notably France, contemplate governmental liability for normative acts or for the failure to put in place normative acts. In Germany, this question, arising under Section 839 of the German Civil Code, is still very much open. The Federal Court of Justice held in 1971 that the action or inaction of the legislature is to be seen in the light of a duty to the public in general and not to any particular person or persons. Only in exceptional cases of so-called one-man legislation, where the interests of a definite individual can be seen to be directly affected, could an individual be said to come within the meaning of Section 839 (56 BGHZ 40, 46).

42. Ross, supra n 1, at p69.

43. Case 5/71 Aktien-Zuckerfabrik Schoppenstedt v Council [1971] ECR 975, at paragraph 11.

44. Joined Cases 64 & 113/76 Dumortier Frères SA v Council [1979] ECR 3091; Case C-63/89 Les Assurances du Credit et Compagnie Belge d'Assurance Credit SA v Council (Export Credit Insurance) [1991] 2 CMLR 737.

45. Case 116/77 Amylum NV v Council and Commission [1979] ECR 3497.

46. Case C-152/88 Sofrimport SARL v Commission [1990] ECR I-2477; Joined Cases C-104/89 and C-37/90 Mulder v Council and Commission Judgment of 19 May 1992. See generally on this point J.Steiner, Textbook on European Law (London: Blackstone Press, 3rd ed, 1992) at p354.

47. Article 215(2) states that: 'In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

48. This was the one of the bases underlying the majority decision in Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1985] 3 All ER 603. See also Ministre du Commerce extérieur v Société Alivar, Judgment of French Conseil d'Etat, 23 March 1984, AJDA (1984) 396. The reciprocity argument has been described by one commentator as 'flawless'. See A.Barav, 'Damages in the Domestic Courts for Breach of Community Law by National Public Authorities' in Schermers, Heukels and Mead (eds), Non-Contractual Liability of the European Communities (Dordrecht: Nijhoff 1988) at p149. Barav argued, however, that whilst national authorities should be held liable on the same basis as Community institutions, that the rules applicable to Article 215 were too strict and ought to be relaxed.

The English law position expressed in Bourgoin is now, however, open to serious doubt. The reasoning of Oliver, LJ, the dissenting judge in Bourgoin is echoed by the Court of Justice by Francovich. For this reason, it seems, Bourgoin was doubted by the House of Lords in Kirklees BC v Wickes, supra n 35. Temple Lang, supra n 1 at p24, criticises Bourgoin on the basis that the two judges who held that conditions of liability of Article 215 must be fulfilled did not consider fully whether they had in fact been met, simply assuming that they had not.

49. See, for example, Bourgoin, supra n 48, and Dunlop v Woollahra [1982] AC 158.

50. See, for example, the judgment of Lord Justice Parker in the Bourgoin case, supra n 48, at 628.

51. See D.Curtin, 'The Non-Contractual Liability of the Community Legislature for Illegal Directives: Effective Judicial Protection?' (1992) 17 ELR 46, noting Export Credit Insurance, supra n 44. See also Joined Cases 106-120/87 Asteris AE and others v Greece [1988] ECR 5515, 5539.

52. Joined Cases 19 & 126/79 BALM [1980] ECR 1863, 1879. The Court also dismissed the relevance of Article 215 to actions of Member States, although on procedural grounds, in Case 101/78 Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten [1979] ECR 623. Further, the Court stated in Case 60/75 Russo v AIMA [1976] ECR 45, that liability of a Member State for breach of Community law must be established by the national courts 'in the context of the provisions of national law relating to the liability of the State.'

53. Case 199/82 San Giorgio, supra n 33.

54. The policy issues relating to Article 215 are discussed by T.Roberts, 'Judicial Review of Legislative Measures: the European Court Breathes Life into the Second Paragraph of Article 215 of the Treaty of Rome' (1988) 26 Columbia Journal of Transnational Law 247, 255-262.

55. The classic statement of principle on this issue was made in the United States Supreme Court, by Cardozo, J in Ultramares Corporation v Touche 174 NE 441, 444 (1931). He warned of the dangers of liability 'in an indeterminate amount for an indeterminate time to an indeterminate class.' In the English courts, see, for example, the ruling of the Privy Council in Rowling v Takaro Properties Ltd, supra n 40.

56. The Schoppenstedt formula, quoted supra p***, specifically relates to 'legislative action involving choices of economic policy'. This wording has been repeated in subsequent pronouncements.

57. See generally, Hartley, supra n 16, chapter 13 and Steiner, supra n 41, chapter 27.

58. See Sovrimport and Mulder, supra n 46.

59. The Court has indicated a concern to preserve the relationship between the various remedies suggested by the Treaty in other areas. Its policy in relation to Article 173, which has been to construe the locus standi requirements of direct and individual concern strictly has the effect of giving a literal interpretation to the wording of the Treaty. Only addressees and de facto addressees of Community measures may challenge them directly. See, for example, Case 25/62 Plaumann & Co v Commission [1963] ECR 95; Case 789/79 Calpak SpA v Commission [1980] ECR 1949. Parties to whom measures are merely applied are encouraged to challenge them by means of the 177 preliminary reference procedure which, the Court clearly believes was intended by the Treaty framers to be the primary means of recourse for individuals.

60. Paragraph 71 of his opinion.

61. Paragraph 72.

62. supra n 52. The idea that there might be a double standard in operation in the Community, with Member State actions subjected to more stringent conditions than those applicable to the Community institutions is not a new one; such a double standard has been clearly identified, inter alia, in the field of the application of the general principles of Community law. See generally Steiner, supra n 41, chapter 4 and J.Coppel and A.O'Neill, 'The European Court of Justice: Taking Rights Seriously?', (1992) 29 CMLRev 669.

63. Case C-213/89 R v Secretary of State for Transport, ex parte Factortame and others [1990] ECR I-2433.

64. supra n 36.

65. Joined Cases 106-120/87 Asteris AE and others v Greece, supra n 51.

66. at paragraph 18.

67. See further n 51, supra. See also Advocate General Capotorti in Granaria, supra n 52, at 644.

68. See Snyder, supra n 13.

69. On the 169 action, see A.Dashwood and R.White, supra n 20. See also U.Everling, 'The Member States of the European Communities before their Court of Justice' (1984) 9 ELRev 215.

70. See most recently Case C-249/88 Commission v Belgium 19.3.1991 at paragraph 41. Other cases are noted to illustrate that Member States are liable no matter which organ of the State is responsible for the failure, Case 52/75 Commission v Italy [1976] ECR 277, and that Member States must take all necessary measures to remedy their defaults, Joined Cases 24 and 97/80 Commission v France [1980] ECR 1319.

71. Various examples of the Court's attitude may be given: Joined Cases 6 and 11/69 Commission v France (aid to coal and steel exports) [1969] ECR 523; Case 16/69 Commission v Belgium (tax on imported wood) [1970] ECR 237; Case 48/71 Commission v Italy (art treasures) [1972] ECR 527; Case 30/72 Commission v Italy (fruit tree grubbing) [1973] ECR 161; Case 128/78 Commission v UK (tachographs) [1979] ECR 419; Case 306/84 Commission v Belgium (doctors qualifications) [1987] ECR 675; Case C-157/89

Commission v Italy (wild birds) [1991] ECR I-57; Commission v Italy (toxic waste in Campania), supra n 18.

72. See, for example, Case 6/60 Humblet v Belgium [1960] ECR 1125 and Joined Cases 314-316/81 and 83/82 Procureur de la Republique and Comité National de Défense contre l'Alcoolisme v Waterkeyn [1982] ECR 4337.

73. Case 43/72 Merkur v Commission [1973] ECR 1055. The applicant was allowed to claim damages on the basis of a Community act which had not previously been held to be invalid in Article 173 proceedings. The illegality or otherwise of the act could equally well be established in the context of the damages proceedings.

74. It should be noted, however, that in certain states, notably Belgium and France, there is little meaningful distinction drawn between an unlawful act and a fault.

75. Re Suckler Cows, Toxic Waste in Campania, supra n 18.

76. Commission v Belgium (tax on imported wood), supra n 71.

77. Joined Cases 90 and 91/63 Commission v Luxembourg and Belgium [1964] ECR 625.

78. Case 101/84 Commission v Italy [1985] ECR 2629.

79. See CILFIT, supra n 34.

80. This point was raised in the English courts in Kirklees BC v Wickes, supra n 35. The House of Lords conceded that if the Court of Justice found the Sunday trading provisions of the Shops Act to be contrary to Article 30 then 'the UK Government may be obliged to make good damage caused to individuals by the breach of Art 30 for which it is responsible' (per Lord Goff at 786). However, the Council was not required to give an undertaking to the respondent that it would make good the damages in these circumstances, inter alia because such a declaration would impose liability on the Council whereas in fact, according to Francovich, it should properly lie with the Government.

81. See Marshall, supra n 22; Case C-188/89 Foster v British Gas [1990] ECR I-3313; Doughty v Rolls Royce [1992] CMLR 1045; D.Curtin, 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context' (1990) 15 ELR 195.

82. Article 48(4) states that: 'The provisions of this Article shall not apply to employment in the public service. See, for example, Case 149/79 Commission v Belgium [1980] ECR 3881, [1982] ECR 1845; Case 66/85 Lawrie-Blum v Land Baden-Württemberg [1986] ECR 2121; Case 33/88 Allue & Coonan v Università degli studi di Venezia [1989] ECR 1591; J.Handoll, 'Article 48(4) EEC and Non-National Access to Public Employment' (1988) 13 ELR 223; G.Morris, S.Fredman and J.Hayes, 'Free Movement and the Public Sector' (1990) 19 ILJ 20. The public-private distinction also arises in other areas of Community, such as the regime for state aids of Article 92 EEC.

83. See the comments of Advocate General Van Gerven in Foster, supra n 81, at p3336.

84. The Court in Foster, supra n 81, laid down a broad definition of the state. It stated, at paragraph 20, that:

> '[A] body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.'

This is to be read together with the with the advice of Advocate General Van Gerven, at p3341, that the definition was to be applied with a view to a broad construction of the state.

85. Case 249/81 Commission v Ireland [1982] ECR 4005.

86. In this example, the Irish Government had appointed the chairman and members of 'The Irish Goods Council' provided most of its funds and laid down the aims and outline of the promotional campaign.

87. See, for example, Case C-246/89R Commission v United Kingdom [1989] ECR 3125.

88. Joined Cases 64 and 113/76, supra n 44, at para 21.

89. See, for example, Joined Cases 145/83 & 53/84 Adams v Commission [1985] ECR 3539.

90. See text accompanying n 7, supra.

91. Temple Lang, supra n 1 at p23 points out that, in view of the opinion of Advocate General Tesauro in Factortame (No.1), the Court was quite aware that Community Law might give a right to compensation (and a large amount of compensation at that) in the circumstances of the Factortame case. It did nothing, however, to limit the Francovich principle in order that it might not apply to the facts of Factortame.

92. Advocate General Darmon in Joined Cases C-177/88 and C-179/88 Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) [1990] ECR I-3941, 3956 and Handels- og Kintorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (Hertz) favouring this view, described the Court's case-law on the direct effect of directives as 'no more than a last resort'(at p3958). For the alternative view, that plaintiffs should have a free choice of remedy, see Ross, supra n 1, at p59.

93. See Case 43/75 Defrenne v Sabena World Airlines [1976] ECR 455 and Case C-262/88 Barber v Guardian Royal Exchange Assurance [1990] ECR I-1889. The determination of the precise meaning of non-retroactivity in Barber remains to be determined. See also Case 24/86 Blaizot v University of Liège [1988] ECR 379.

94. The Court may be seen to be adopting the Advocate General's view as to the seriousness of the case against Italy. He stated, at paragraph 1 of his opinion, that:

> 'Rarely has the court had to give judgment in a case where the loss caused to individuals concerned by a failure to implement a Directive has been as scandalous as here.'

95. Cutler v Wandsworth Stadium [1949] AC 398 and Curran v Northern Ireland Coownership Housing Association Ltd [1987] AC 718 are good examples of this approach.

96. See Temple Lang, supra n 1, at 41.

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